

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
PANAMA CITY DIVISION

RAMON ARMAS BORRODO JR.,  
Plaintiff,

vs.

MCDONALD, PATE,  
MCKENZIE and KENT,  
Defendants,

CASE NO: 5:04CV165-RH/WCS

04 SEP 15 PH 2:04

SPC

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PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S MOTION  
FOR RECONSIDERATION

PLAINTIFF, RAMON ARMAS BORRODO, JR., hereby moves this Court to strike the Defendant's motion for reconsideration under Fed. R. Civ. P. Rule 12(f). As support therefor the plaintiff states:

STATEMENT OF FACTS

- (1) Plaintiff filed 2 emergency grievances concerning the present claims.
- (2) Plaintiff's grievances were intercepted both times.
- (3) This Court has previously ruled against the Defendants motion to Dismiss two separate time's, yet the Defendants continue to raise the same issue for a third consecutive time.
- (4) Plaintiff now moves this Court to strike the Defendants motion.
- (5) Plaintiff has referred to the room where he was abused as the D.R. hearing room and also as the nurses examination room.
- (6) Both are one and the same. Exiting G-dorm quad 3 turn right and it's the first door on the right.

ARGUMENTS

(1) The Issue raised by Defendants are mute.

This court has previous ruled twice against the Defendants Motion to Dismiss. The Defendant have again raised the same frivolous issue for the third consecutive time abusing the court and causing delay to this court by continually filing the same issue's which this court has previously ruled on. The court must strike the Defendant motion for reconsideration for it's frivolousness.

For the sake of argument the plaintiff ~~mainly~~ maintains that these issues raised by the plaintiff ~~are~~ Defendants are mute. Plaintiff did not fail to exhaust administrative remedies due to the fact that he attempted on two separate occasions to file Emergency Grievances directly to the secretary of F.D.O.C. Both times the grievances ~~process~~ <sup>(sp)</sup> was ~~temporarily~~ <sup>(sp)</sup>

were intercepted by officials and/or officer's tampering with the plaintiff's attempts to file grievances, for the specific purpose of prohibiting the plaintiff from filing A complaint under 42 U.S.C. § 1983. After the grievances were placed in the prison's internal mailing system they were no longer in the ~~prison~~<sup>re</sup> plaintiff's control nor could the plaintiff force officials to respond to said grievances. The plaintiff put forth due diligence by attempting on 2 separate occasions to file grievances. Even though the plaintiff exhausted Administrative Remedies after the first time he attempted to file an emergency grievance in December of 2002, he again attempted to file an emergency grievance in JANUARY 2003 because of no response to the first. The plaintiff cannot control officer's interferences with the filing of his grievances. See Holloway v. Connell 685 F.2d 150, 154; Ferrandi v. Moron 618 F.2d 888, 891-92, When prison officials do not respond to a prisoner's initial grievance, Administrative Remedies are exhausted. See Powe v. Ennis 177 F.3d 393 (5<sup>th</sup> Cir. 1999); Lewis v. Washington 300 F.3d 829 (7<sup>th</sup> Cir. 2002); and Nylus v. Reno 204 F.3d 65 (3<sup>rd</sup> Cir. 2002).

Furthermore the purpose of the grievance procedure in F.A.C. 33-103.001 is "This procedure will provide a written record in the event of a subsequent judicial review". See Defendant's Motion to Reconsider page 7. The plaintiff made his initial complaint on November 29, 2002. He was interviewed by ~~Ex~~<sup>Re</sup> Inspector Kraus on 12/19/02 where he again made affidavit and his verbal sworn statement recorded. Plaintiff was interviewed at a later time by another inspector in the beginning of 2003. The plaintiff's statements have all remained consistent, both verbal and written, as well as the present complaint. The Defendants have a sufficient written record.

(2) Assaults and Excessive force are not bound by exhaustion requirements of 42 U.S.C. § 1997e(a).

The plaintiff maintains that he did exhaust administrative remedies but contends that Exhaustion of State Remedies may be required in those limited circumstances in which "Congress has carved out a specific exception to the general rule that exhaustion is not required". See Doe v. Pfrommer 148 F.3d at 78. The plain meaning of "prison conditions" in § 1997e(a) does not obviously encompass particular instances of excessive force or assault, it actually suggests the opposite. In the context of this statute the term "conditions" used in the plural form, denotes "attendant circumstances" or existing state of affairs as exemplified by such particular ordinary phrases as "living conditions". See Webster's Third New International Dictionary 473 (1961). See also Booth v. Cherner 206 F.3d at 300-01 (Noonan, J., concurring and dissenting). In light of this definition of "conditions" the use of the term "prison conditions" in 1997e(a) would appear to refer circumstances affecting

everyone in the area," rather than, "single or momentary matters"], such as beatings or assault that are directed at particular individuals. See also Carter v. Kirwan 1999 WL 14014 at \*3 ("The ordinary, contemporary, common meaning of the phrase "prison conditions" refers to this such as medical treatment, food, clothing, OR the nature and circumstances of the housing AVAILABLE in Prison." Therefore excessive force and assault are not "prison conditions" nor subject to exhaustion requirements of 42 U.S.C. § 1997e(a) and therefore issues presented in the defendants motion to dismiss are mute.

### CONCLUSION

WHEREFORE, the Plaintiff, pro se moves this Honorable Court to STRIKE the Defendant's Motion for Reconsideration, that even though excessive force and/or assault are not bound by exhaustion requirements of 42 U.S.C. ~~1997e(a)~~ § 1997e(a) and do not apply to this case since the claim in this matter concern excessive force and assault, that the plaintiff has exhausted administrative remedies.

Respectfully Submitted,  
R. Bo

### OATH OF VERIFICATION

UNDER PENALTIES OF PERJURY, I, RAMON ARMAS BORRERO, JR., declare that I have read the foregoing and that it is true and correct.

8/31/05

R. Bo

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that I have forwarded a copy of the foregoing document and delivered it into the hands of an institution official to be mailed postage pre-paid by U.S.P.S. to:

CARY/Kilinski / Joy A. Stubbs

Asst. Attorney General

Attorney General's Office

The Capitol, PL-01

Tallahassee, FL 32399-1050

On this 14<sup>th</sup> day of September, 2005

R. RBS

Ramon Borroto X27467

F.S.P. B-1316

7819 N.W. 228TH ST.

Ratford, FL 32026

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